No. 85-1277 (16)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA AND CRAIG MARSH, INDIVIDUALLY AND AS SUPERINTENDENT OF SCHOOLS OF NASSAU COUNTY, FLORIDA,

Petitioners,

v.

GENE H. ARLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE EPILEPSY FOUNDATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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September 19, 1986

CASILLAS PRESS, INC. ; 1717 K ST NW WASHINGTON DC 20036 - 223-1220

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INTEREST OF *AMICUS CURIAE*[1]

The Epilepsy Foundation of America is a non-profit corporation founded in 1968 to advance the interests of the over two million Americans with epilepsy through research, vocational programs, public information and education, professional awareness, and advocacy.

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[1]Copies of letters giving consent by both parties to the filing of this brief have been filed with the Clerk of this Court.

The term "epilepsy" evokes stereotyped images and fears, which affect persons with this medical condition in all aspects of life, including, and especially, employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with epilepsy and has supported the development of laws which protect individuals from discrimination based on these stereotypes and fears.

The Epilepsy Foundation of America has a strong interest in the outcome of this case. Of specific concern to the Foundation are the issues surrounding the interpretation of the definition of handicap under Section 504 of the Rehabilitation Act which are raised by the brief of the U.S. Department of Justice as an *Amicus Curiae* in support of Petitioner. The Epilepsy Foundation of America is concerned that adoption of the Justice Department's analysis would have a drastic impact on the availability of Section 504 as a remedy for persons with epilepsy, as well as other handicaps who have been treated adversely due to fears and stereotypes about the effects of their handicaps.

SUMMARY OF ARGUMENT

This case calls upon the Court to decide whether the United States Court of Appeals for the Eleventh Circuit was correct in finding that respondent, who has a disease which under some circumstances may be contagious, meets the definition of "handicapped individual" under the Rehabilitation Act of 1973. 29 U.S.C. §701 *et seq.* This is in fact a very narrow question. It is easily answered in the affirmative upon an examination of the relevant law and legislative history.

Both petitioner[2] and the United States Department of Justice (DOJ), however, have attempted to enlarge the scope of this Court's inquiry by urging the court to hold that Section 504 of the statute, 29 U.S.C. §794, does not cover decisions based upon irrational fears about the effects of handicaps, even where they would concede that the handicap itself meets the statutory definition.[3]

Section 504 of the Rehabilitation Act of 1973 was specifically designed to prevent persons with handicaps from being denied participation in life's activities, including employment, based on irrational fears and prejudices about their conditions.

Throughout history, persons with epilepsy have been the subjects of discriminatory decisions due to irrational fears and stereotypes about epilepsy. The Rehabilitation Act has been of major importance in their efforts to overcome society's fears and to achieve fair treatment in the workplace. Allowing fears, however rational or irrational, to justify adverse employment decisions would render the Act meaningless and would give credence and legitimacy to the worst types of prejudice in our society.

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[2]Although Petitioner does not make this argument formally in its brief, it has filed with the Court a copy of the United States Department of Justice memorandum entitled "Application of Section 504 of the Rehabilitation Act to Persons With AIDS, AIDS-Related Complex, or Infection with the AIDS Virus." (June 20, 1986), which first stated the DOJ's view of Section 504's applicability to diseases that may be contagious.

[3]*Amicus* adopts the discussion of why tuberculosis is a handicap within the meaning of Section 504 which is contained in Section II of the Brief on Behalf of Senators Cranston, *et al.*, and Representatives Atkins, *et al.*, in Support of Respondent (hereinafter cited as the Congressional Brief).

An appropriate framework, which balances the rights of the individual and society's interests in safety, exists under Section 504 of the Rehabilitation Act for evaluating decisions not to hire, or as in this case, to fire, a handicapped employee. This framework requires an individualized assessment of whether, based upon the objective facts about her condition, respondent was able to perform the essential functions of her job without a reasonable probability of substantial harm to the public. Therefore, *amicus* urges this Court to affirm the Eleventh Circuit's remand of this case to determine whether respondent was in fact a handicapped individual who was otherwise qualified for her position.

ARGUMENT

I. THE REHABILITATION ACT IS A REMEDIAL STATUTE DESIGNED NOT ONLY TO PROTECT PERSONS WITH HANDICAPS FROM DISCRIMINATION BASED UPON THEIR CONDITION BUT ALSO TO PROTECT PERSONS WITH HANDICAPS FROM DISCRIMINATION BASED ON FEAR AND PREJUDICE ABOUT THEIR CONDITION.

In the Brief of the United States Department of Justice as *Amicus Curiae* in support of Petitioner (hereinafter cited as the DOJ brief), the Department claims that adverse decisions against persons with handicaps which are based on a fear of contagion, whether rational or irrational, are not decisions based on handicap and therefore are not subject to Section 504.

This court should reject the Department of Justice's view as doing great violence to the meaning and integrity of Section 504 as well as to the intent of the Act's framers. Adoption of this analysis would render the Act meaningless for persons whose disabilities carry a history of fear

and misperception,[4] and who have been struggling for years to be judged based on their real abilities instead of on stereotype.

The essence of the Justice Department's argument is that Section 504 is very limited in its application because it only applies to decisions which are based on a belief about the person's actual physical or mental abilities, and not about any of the effects of his impairments. Thus, since contagiousness does not actually cause a physical or mental impairment which substantially limits a major life activity, a fear about contagion, whether rational or irrational, is not actionable.

This analysis is inherently flawed, and fails upon close examination. It is not possible to separate the effects of a disease from the disease itself. One can no more separate contagiousness or the perception of contagiousness from a condition such as tuberculosis, than one can separate the effects of having seizures from the seizure disorder itself.

A review of the history of epilepsy provides a salient example that fear, rather than the handicap itself, is the ma-

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[4]Epilepsy is not the only condition which carries with it a history of fear and misunderstanding. Persons with cancer, Hansen's Disease (leprosy), cerebral palsy and others have all been subject to discriminatory decisions based on prejudice and fear. Similarly, tuberculosis continues to carry the stigma which developed at the time it was a relatively untreatable and thus highly contagious disease. As the Brief of the American Medical Association in Support of Petitioners points out, modern medicine can render tuberculosis non-infectious within days or weeks of diagnosis. AMA Brief at 7. However, as the court below suggests, employers continue to make judgments about persons with tuberculosis that are not based on objective medical information, but are rather "reflexive reactions grounded in ignorance or capitulation to public prejudice." *Arline v. School Board of Nassau County*, 772 F.2d 759, 765 (11th Cir. 1985).

jor impetus for discrimination against persons with handicaps.

A. Despite Medical Advances in the Treatment of Epilepsy, Societal Attitudes Toward Persons With Epilepsy Continue to Reflect Misunderstanding and Fear.

The person with epilepsy is most often far less handicapped in fact by his seizures than by society's fear and misunderstanding of the disorder.[5] Unfortunately, societal reactions to the condition have not kept pace with scientific understanding of the complexities of the brain and medical advances in treatment of epilepsy.[6] Based on the most recent survey of representative adults by the American Institute of Public Opinion (Gallup Poll), in 1979 six percent (6%) of the American population still objected to their children associating with persons with epilepsy, nine percent (9%) still believed persons with epilepsy should not be employed, three percent (3%) believed that epilepsy was a form of insanity, and nearly one out of five (18% percent)

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[5]Gallup, *Introduction* to Arangio, *Behind the Stigma of Epilepsy* (1975).

[6]Epilepsy is a collection of symptoms which result from a temporary and sudden disturbance in the normal pattern of the electrical activity of the brain. These symptoms are called seizures. The type of seizure that occurs depends upon the nature and location of the disturbance in the brain and thus, seizures range from the blink of an eye to convulsions accompanied by a lapse of consciousness. The treatment of choice for epilepsy is antiepileptic medication, which now make it possible for fifty percent of all persons with seizures to live seizure-free lives, and an additional twenty-five to thirty percent to achieve significant partial control of their seizures. For most persons with epilepsy this seizure control has allowed them to lead normal lives, with the physical ability to work at jobs of their choice without significant risk. *See* U.S. Department of Labor, Employment and Training Administration, *Interviewing Guides for Specific Disabilities: The Epilepsies* (1984).

adults stated they would object to a son or daughter marrying a person with epilepsy.[7]

Although acceptance of epilepsy has improved considerably since the first public opinion survey was taken in 1949, the stigma of epilepsy remains a social force affecting the lives of persons with the condition.[8]

1. Societal Attitudes Toward Persons With Epilepsy Reflect a Long-Standing History of Fear and Prejudice About the Condition.

Although modern medicine now understands epilepsy to be a medical condition which results from excessive electrical discharges in the brain, throughout history, epilepsy was considered a frightening and horrible disease which afflicted both body and soul through the influence of unnatural forces such as demons, moon madness, or witchcraft.[9]

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[7]Caveness, W.F., and Gallup, G.H., Jr., *A Survey of Public Attitudes Toward Epilepsy in 1979 with an Indication of Trends Over the Past Thirty Years,* 21 Epilepsia 509 (Oct. 1980).

[8]Report of the Commission for Control of Epilepsy and Its Consequences, U.S. Department of Health, Education, & Welfare, *Plan for Nationwide Action on Epilepsy,* Volumes I, II (DHEW Publication Nos.: NIH 78-276 and 78-312 (1978) (hereinafter cited as the *Commission Report*), Volume II, Part I at 492. The first Gallup Poll on epilepsy indicated that 43% of those interviewed objected to their children associating with people with epilepsy, 41% thought epilepsy was a form of insanity, and 45% thought people with epilepsy should not be employed. Caveness & Gallup, *supra,* note 7.

[9]Epilepsy was known to the ancients well before Hippocrates rightly diagnosed it as stemming from an injury to the brain. The Egyptians were aware of epilepsy; they had already refined techniques of brain surgery which were disclosed in the treatises during the Middle Kingdom. *Commission Report, supra,* note 8, Volume II, Part I at 492. Unfortunately, the Egyptian treatises and Hippocrates' notes were not widely read or accepted.

To the ancients, the person with epilepsy was an object of horror and disgust, someone to be avoided at all costs. Individuals were advised to spit before a person with epilepsy in order to ward off his evil spirits and were told not to eat or drink out of his dishes for fear of catching the condition.[10]

Similarly, in the Middle Ages, persons with epilepsy were seen as having "evil breath" which could infect all those around them.[11] While this belief was discarded by scientists at the end of the fifteenth century, it reappeared again in the eighteenth century when it was observed that the mere sight of a seizure could provoke seizures in an onlooker.[12]

In the nineteenth century, persons with epilepsy were also considered mentally disturbed and potentially violent or homicidal. In 1848, the British Ministry of Labour issued a pamphlet which stated:

> [E]pileptics are commonly believed to be mentally imbalanced, dull, or frankly mentally defective, liable to progressive mental deterioration, awkward to live with, antisocial or potentially criminal, incurable, resistant to all forms of medicine, unemployable, and persons who should be sequestered in institutions.[13]

These various beliefs about epilepsy led to horrible treatment of persons with seizures, ranging from physical violence to extreme physical isolation such as incarceration in

[10]O. Temkin, *The Falling Sickness* (1971) at 114.

[11]*Id.* at 115.

[12]*Id.* at 117.

[13]Fox, *The Epileptic in Industry,* 11 British Journal of Physical Medicine 140-144 (September-October 1948).

institutions.[14] Although today violent societal reactions do not threaten the lives of people with epilepsy, subtle but widespread aspects of discrimination have led persons with epilepsy to adopt roles as socially isolated individuals. One federal court has summarized this "historically based" perception of epilepsy as follows:

> Society's view, including that of professional medical personnel, is/was that epileptics are/were socially disfavored and viewed as persons who are subnormal.

Smith v. Adm. of Veterans Affairs, 32 Fair Empl. Prac. Cas. (BNA) 986, 990 (1983).

These attitudes and beliefs have also been reflected in American laws and policies throughout this century.[15] Since 1900, nineteen states have had statutes that either prohibited or severely restricted the rights of people with epilepsy to marry and conduct a normal family life.[16]

[14]For example, in Scotland in the Middle Ages, men with epilepsy were subject to castration and pregnant women with the disorder were buried alive. O. Temkin, *supra* note 10, at 132-133. In the eighteenth and nineteenth centuries persons with epilepsy were locked away in institutions and characterized as insane or violent. Brody, *Epilepsy: Dispelling the Myths,* N.Y. Times, April 19, 1978 Sec. III. at 13, col. 1.

[15]*See generally,* Finesilver, *The Legal Aspects of Epilepsy,* in EPILEPSY REHABILITATION, 51-65 (G.N. Wright, Ed., 1976) *See also,* Fabing and Barrow, *Medical Discovery as a Legal Catalyst: Modernization of Epilepsy Laws to Reflect the Medical Progress,* 50 Nw. U.L. Rev. 42, 46 (1955); and Masland, *Epileptics: Their Medicolegal Problems and Confrontations,* 7 Lawyer's Medical Journal 339 (2d Series) (1979). Epilepsy Foundation of America, *The Legal Rights of Persons With Epilepsy* (Fifth Edition) (1985).

[16]Finesilver, *supra,* note 15 at 57; *see e.g.* Wash. Rev. Code §26.04.230 (1951) [fine up to $1,000 and imprisonment for a person who marries knowing he has epilepsy].

These marriage statutes were originally enacted on the presumption that epilepsy was hereditary, progressively degenerating, and basically incurable. It was also believed that persons with epilepsy were less intelligent than the general population, and hence, prohibiting marriage and procreation was a method of social control over this feared condition.[17] The last of the laws interfering with the right of persons with epilepsy to marry was not repealed until 1982.[18]

Epilepsy was also one of the conditions that eugenic sterilization laws were designed to control. The enactment of these statutes was the result of a general movement advocating sterilization of the habitual criminal, the mentally ill, and the feebleminded as a means of eliminating "detrimental elements" from society.[19] As of 1955, seventeen states still had involuntary sterilization laws which were specifically applicable to persons with epilepsy.[20] Today, one of these statutes still exists in limited form in the United States.[21]

[17]Fabing & Barrow, *Epilepsy & The Law* 5 (1956).

[18]In 1982, Missouri repealed its statute making it a crime for someone to solemnize a marriage if that person knew that one of the parties had epilepsy. *See* Mo. Rev. Stat. §451.115 (Vernon 1986 Supp.), amended by L. 1982, p. 626 §1.

[19]*Commission's Report, supra,* Volume I at 117.

[20]Fabing & Barrow, *Epilepsy and The Law* 29 (1956).

[21]Delaware still provides for the involuntary sterilization of persons with epilepsy in certain situations. *See,* Del. Code Ann. tit. 16 §57-01 *et seq.*, as amended, (1983).

2. Modern Employer Attitudes Toward Hiring Persons With Epilepsy Continue to Reflect Misunderstanding and Fear of the Condition.

Perhaps the most dramatic social consequence to the individual of having a diagnosis of a seizure disorder is its effect on obtaining and maintaining employment. Unfortunately, all too often persons with epilepsy are denied employment or not trained for work they could do well and safely, because of an unreasoned fear of their seizures. The working community has not welcomed persons with epilepsy with open arms.

In 1948, the U.S. Department of Labor reported that epilepsy was the most difficult handicap to overcome in obtaining employment, as exclusionary policies were common.[22] In 1960, a study conducted by the same department reported that epilepsy was the condition which employers were least willing to accept in their employees.[23] This was despite effectiveness studies that continued to demonstrate that the efficiency of the handicapped worker was as great as or exceeded that of the "normal" worker.[24]

The number of unemployed persons with epilepsy (among those fully able to work) remains disproportionately high. The Congressionally established Commission

[22]Epilepsy Foundation of America, *New Directions in Epilepsy Rehabilitation: A Resource Manual.* (1979) at i.

[23]*Id.*

[24]*See* e.g., Udel, *The Work Performance of Epileptics in Industry,* Arch. Environmental Health 1, September, 1960. Later studies produced the same conclusions. For example, a 1982 report from Dupont concluded that, "Dupont studies over a period of twenty-five years have shown that the performance of handicapped employees is equivalent to that of their non-impaired co-workers. In safety, job duties and attendance, the handicapped hold their own." E.I. du Pont de Nemours and Co., *Equal to the Task* 4 (1982).

for the Control of Epilepsy and Its Consequences[25] reported that the unemployment rate of this population is two to three times the national-average. The underemployment rate, (i.e., persons employed in positions below their level of skill) remains even higher.[26] In reviewing the many factors that might contribute to these high rates, the Commission identified employer attitudes toward hiring persons with epilepsy as a major barrier to achieving employment. Others have agreed with this view.

> "Undoubtedly, the biggest obstacle to the rehabilitation of persons with epilepsy is employer resistance to hiring them. Furthermore, the emotional roots of this resistance aren't easily altered by logic or intelligent reasoning.[27]

A study by Sands and Zalkind which sought to explore the effects of an educational campaign on changing employer attitudes found that:

[25]The Commission on Control of Epilepsy and its Consequences was established by Congress to make a comprehensive study of the medical and social management of epilepsy, to investigate and make recommendations concerning the proper roles of Federal and State governments and national and local public and private agencies in research, prevention, identification or treatment and rehabilitation of persons with epilepsy, and to develop a comprehensive national plan for the control of epilepsy and its consequences. P.L. 94-63 §604(b) (1975).

[26]*Commission Report,* Vol. I at 85. In addition, a 1980 study of unemployment rates among men with epilepsy concluded that unemployment in the adult male population exceeded the rate in the general population by 12 percent and that these figures substantially "underestimated the magnitude of the problem." Emlen and Ryan, Analyzing Unemployment Rates Among Men With Epilepsy, Unpublished paper presented at the 30th Western Institute on Epilepsy, Portland, Oregon, March, 1979.

[27]Benson, *Epilepsy and Employment: Placement Problems and Techniques,* 3 American Rehabilitation 3 (March/April 1978).

> [e]ven though employers view favorably the epileptics who work for them, they do not yet generalize these positive feelings into hiring behavior and practices. Their feelings toward hiring – that is, not to employ more epileptic workers – remain steadfast. Furthermore, their denial that unemployment among epileptics is due to employer attitudes makes them almost impervious to conventional education techniques.[28]

Numerous studies have been conducted demonstrating the employer's attitudinal barrier to hiring persons with epilepsy in many industries.[29] These studies reflect the conditions that Section 504 was intended to ameliorate. For example:

In 1974, a survey of seven (7) industries, all employing more than 200 workers, was conducted by the Federation of Jewish Philanthropies. Personnel directors admitted they fired persons with epilepsy upon discovery of the condition despite attempts by co-workers to hide the epilepsy. Six of the seven companies excluded persons with epilepsy to a greater extent than they did orthopedically disabled, the visually impaired, those with cerebral palsy, and cardiac patients.[30]

A longitudinal study was conducted in the Midwest between 1962 and 1973. Nearly 1,400 employers were questioned regarding their views on three disability categories, one of which was epilepsy. Questions centered on work

[28]Sands and Zalkind, *Effects of An Educational Campaign to Change Employee Attitudes Toward Hiring Epileptics,* 13 Epilepsia 87 (1972) at 94-95.

[29]These studies as well as others, are reviewed in greater detail in the *Commission Report, supra,* note 28, Volume II at 493-497.

[30]J. Gorman, *Epilepsy: Current Communications Problem Areas,* in MODERN DIMENSIONS IN EPILEPSY (L. Perlman ed. 1974).

tolerance, reliability, need for extra supervision, absenteeism, co-worker relationships, ability to adjust to a new work environment, and tolerance of job pressure. After ten years, 124 employers were recontacted. Although persons with epilepsy gained considerably in favor compared to those with the other handicaps, employers who knowingly hired people with seizure disorders rose from a mere 5 percent in 1962 to only 12 percent in 1973.[31]

A 1984 study comparing employer attitudes toward persons with eight different handicaps suggested that attitudes of employers toward persons with epilepsy are begining to improve.[32] However, the authors stated that some improvement in attitudes does not mean that employment discrimination against persons with handicaps has disappeared.

B. Congress Recognized That Fears and Misperceptions About A Handicap Often Present A Greater Barrier to Employment Than the Handicap Itself.

The legislative history of the Rehabilitation Act clearly demonstrates that Congress intended Section 504 to cover adverse decisions which are based on stereotyped beliefs and fears about a person's handicaps and not, as the DOJ argues, just those situations in which an employer feels a person cannot do the job because his handicap impairs his actual abilities to perform the work in question.

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[31]Hartlage, *Ten Years of Employer Attitudes*, National Spokesman at 7 (September 1974).

[32]Fuqua, Rathbun, & Gade, *A Comparison of Employer Attitudes Toward the Worker Problems of Eight Types of Disabled Workers*, 15 Journal of Applied Rehabilitation Counseling 40 (1984).

Title V of the Rehabilitation Act established as a national policy the protection of the civil rights of handicapped people, and was based on the doctrine that handicapped people have a "basic human right to full participation in life and society."[33]

Briefly, the legislation was designed to promote equal employment opportunities in both the public and private sector.[34] Section 501 of Title V requires all Federal departments, agencies and instrumentalities to have affirmative action plans (updated annually) providing adequate hiring, placement and advancement opportunities for the handicapped.[35] Section 503 mandates affirmative action for federal contractors and subcontractors and provides an administrative enforcement mechanism.[36] Section 504 ensures that programs and activities receiving federal financial assistance will not discriminate against otherwise qualified handicapped persons; it is explicitly applicable to all executive and federal agencies.[37]

In enacting these measures, Congress recognized the barriers that exist to the integration of the handicapped into the mainstream of American society. Congress took substantial evidence and expressly recognized that employer attitudes and fears were largely responsible for the

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[33]S. Rep. No. 1297, 93d Cong., 2d Sess. 56, *reprinted in* (1974) U.S. Code Cong. and Ad. News 6373, 6406. For a thorough review of the civil rights issues of handicapped persons in America, see the U.S. Commission on Civil Rights report, *Accommodating the Spectrum of Individual Abilities*, Clearinghouse Publication 81, September 1983.

[34]29 U.S.C. §701(8).

[35]29 U.S.C. §791(b).

[36]29 U.S.C. §§793(a) & 793(b).

[37]29 U.S.C. §794, as amended by P.L. 95-602.

exclusion of the handicapped from employment.[38] In the Senate Report accompanying the 1974 amendments to the Rehabilitation Act the Senate Committee on Labor and Public Welfare noted that:

> Individuals with handicaps are all too often excluded from school and educational programs, barred from employment or are under-employed because of archaic attitudes and laws, . . .[39]

In the early 1970s, in explaining the need for passage of the Act, Congressman Vanik recounted a court ruling which excluded a child with cerebral palsy from school because his teacher claimed his physical appearance "produced a nauseating effect on his classmates." 117 Cong. Rec. 45974 (Dec. 9, 1971) (remarks of Rep. Vanik). Similarly, Senator Mondale described a story about a woman who was "crippled by arthritis" and who was denied a job because the "college trustees didn't like the idea of her working as a clerk at the college because normal students shouldn't see her." 118 Cong. Rec. 36761 (Oct. 17, 1982).[40]

In *Mantolete v. Bolger,* 767 F.2d 1416 (9th Cir. 1985) the court reviewed the legislative history of the Rehabilitation Act, stating that Congress enacted the statute "to prevent employers from refusing to give much needed opportunities to handicapped individuals on the basis of misinformed stereotypes." 767 F.2d at 1422.

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[38]S. Rep. No. 93-318, 93d Cong., 1st Sess. 4, *reprinted in* (1973) U.S. Code Cong. and Ad. News 2078.

[39]S. Rep. 93-1297, 93d Cong., 2d Sess. 32, *reprinted in* (1974) U.S. Code Cong. and Ad. News 6373, 6400.

[40]There are numerous other examples of Congress' concerns contained in the discussion of the legislative history of the Act contained in The Congressional Brief.

C. The Rehabilitation Act Contains A Framework for Ensuring that Employment Decisions Are Not Based on Irrational Fears and Prejudice by Requiring an Individualized Assessment of the Handicapped Person's Ability to Perform the Job in Question.

To avoid employment decisions based on myths and fears about handicaps, the Rehabilitation Act sets up a very specific framework for employer decision-making. The question presented by the statute is whether the handicapped person is "otherwise qualified" to perform the job. 29 U.S.C. §794. Federal regulations further refine this question by defining "qualified handicapped individual" as follows:

> Qualified handicapped person means . . . with respect to employment, a handicapped person, who with or without reasonable accommodation, can perform the essential functions of the job in question without endangering the health and safety of the individual or others. 29 C.F.R. §1613.702(f).

The determination of whether someone can perform these essential functions without endangering himself or others, however, requires an individualized assessment of the objective medical facts surrounding the person's condition. Such decisions may not be based on stereotype or on the subjective beliefs of the employer. *Mantolete v. Bolger, supra* at 1423.

This analysis requires a matching of the requirements of the job with the individual's specific qualifications and does not allow for broad generalizations about all persons with a particular disability. Thus, this approach is directly contrary to the suggestion in this Court's second Certiorari question that freedom from tuberculosis could be a bona

fide occupational qualification defense (bfoq) under the Rehabilitation Act. Unlike many state discrimination statutes and the other federal civil rights statutes, Section 504 and its regulations do not provide for bfoq defenses.[41] This is deliberate. One of the problems inherent in a bona fide occupational qualification defense in the handicap area is the fact that such an analysis tends to reinforce the very stereotypes the Rehabilitation Act was designed to erase – e.g., persons with epilepsy are unable to work, or persons with tuberculosis are always contagious. By tying the test of who is "otherwise qualified" to factual questions about individual ability, decisions based on stereotype can be avoided.[42]

The Rehabilitation Act does not require an employer to hire a person whose condition poses a reasonable probability of harm to themselves or the public. *Mantolete v. Bolger,* 767 F.2d 1416, 1422 (9th Cir. 1985). Congress understood that fears about safety may be legitimate under certain circumstances but that at other times, fears about safety may be as irrational and baseless as fears about other aspects of a person's handicap. *See* discussion of legislative history contained in the Congressional Brief, Section I.B.2.

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[41]The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, provides for a bfoq defense, as does Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.* A number of state employment discrimination statutes also provide for the defense. *See, e.g.,* NEB. REV. STAT. §48-1108 (Reissue 1984); WASH. REV. CODE §49-60.180(1) (West, 1986 pp). CONN. GEN. STAT. ANN. §46a-60(a) (West 1986 Supp.).

[42]As the AMA brief clearly explains, tuberculosis is not a uniform condition which renders all persons exposed to it infectious, even for short periods of time. AMA Brief at 5-6. Thus it is inappropriate to make employment decisions about persons with tuberculosis without looking at the individual's medical condition based on a detailed analysis of her medical records.

The Court below understood Congress' concern that safety considerations be analyzed by an examination of the manifestations of the individual's particular handicap when it remanded this case for factual findings concerning respondent's medical condition. This remand was appropriate and should be affirmed by this Court.

CONCLUSION

The Rehabilitation Act is a remedial statute deliberately designed not only to protect persons with handicaps from discrimination based on their condition but also based on fear and prejudice about their condition. In enacting the statute, Congress also understood that it was inappropriate to base employment decisions about persons with handicaps on broad generalizations about the particular condition. Thus, it set up a framework which required that the individual's particular qualifications be established in light of his work and medical history. This framework is appropriate for resolution of the issues in this case. This Court should therefore uphold the Court of Appeals decision remanding this case for a factual determination of whether respondent was otherwise qualified to perform the essential functions of the job in question.

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